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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

ORIGINAL FILE

January 4, 1993

Ms. Donna R. Searcy
Secretary
Federal Communications Commission
1919 M Street, N.W., Room 222
Washington, D.C. 20554

Re: Broadcast Signal Carriage Issues,
MM Docket No. 92-259

Dear Ms. Searcy:

Enclosed on behalf of Tel-Com, Inc., are the original and nine copies of Tel-Com, Inc.'s Comments in the above-referenced proceeding.

Please address any questions concerning this letter to the undersigned.

Sincerely yours,

Stephen R. Ross

KAH/mec
Enclosure

No. of Copies rec'd 0+9
List A B C D E

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of the Cable Television Consumer Protection and Competition Act of 1992	)	MM Docket No. 92-259
	)	
Broadcast Signal Carriage Issues	)	

COMMENTS OF TEL-COM., INC.

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SUMMARY OF ARGUMENT

TEL-COM offers the following comments regarding the implementation of the must-carry and retransmission consent provisions of the 1992 Cable Act ("the Act") even though TEL-COM unconstitutional.

TEL-COM has attempted to outline herein the enormous impact of these provisions on cable operators and broadcast stations. In order to implement the Act successfully, the Commission must consider the realities of the existing "marketplace," as well as preexisting obligations placed on cable operators pursuant to other Commission regulations and the Copyright Act.

For the reasons set forth herein, TEL-COM urges the Commission to permit the cable operator to designate the "principal headend" for purposes of defining the geographic area within which noncommercial educational ("NCE") television stations may assert must-carry rights. This principal headend designation would also define the area of dominant influence (ADI) or television market within which a cable system is located for purposes of applying the must-carry provision to commercial broadcast stations. This is especially important for cable systems operating in more than one ADI, which would otherwise be subject to conflicting must-carry claims.

The Commission must also allow the cable operator wide discretion in signal selection and cable channel assignments. The operator must make the final channel assignment when more than one must-carry station asserts its right to the same cable channel number. Must-carry stations only have channel positioning rights to basic tier cable channels, and the designation of the basic tier channels must be left to the cable operator.

Stations which assert must-carry rights are obligated to show that they qualify under the Act and all relevant Commission regulations. Low power television ("LPTV") stations must demonstrate to the Commission that they are eligible for must-carry status, and operators are required to carry such LPTV stations only upon a finding by the Commission that they are qualified. All broadcast stations should be required to demonstrate that their signals meet the Act's required signal quality for cable carriage.

In order for retransmission to work, television stations must have the right to grant or withhold consent. Congress, in the Act, has stated that the television station has a right to be compensated for the "value of its signal." The programmers should not be permitted to enforce or create programming contracts with television broadcasters that block the station's retransmission consent rights.

The Commission must clearly define the relationship between must-carry and retransmission consent. Stations that elect retransmission consent do not automatically obtain rights, such as channel positioning, and rights pursuant to Part 76 of the Commission's rules which automatically flow to must-carry stations. In the retransmission consent "marketplace," all terms and conditions will be negotiated, with the sole caveat that the contract does not interfere with the rights of must-carry stations.

The Commission must also clarify that the must-carry/retransmission consent election runs with the broadcast station. A change in ownership of the station, for example, does not provide an opportunity to change the election before the three year cycle is completed. The must-carry/retransmission consent election, as well as the terms of any retransmission consent agreement, must be binding on new station owners.

With respect to the resolution of disputes regarding retransmission consent contracts, TEL-COM believes that state court jurisdiction is preempted by the Act. The Act vests exclusive jurisdiction to revolve must-carry disputes with the FCC, and TEL-COM believes that the FCC should also resolve disputes concerning retransmission consent agreements. Congress has clearly occupied the field of cable television, and any contract disputes must be resolved pursuant to federal common law, not state common law. The FCC or the federal courts are the only entities with jurisdiction to consider such disputes.

TEL-COM has attempted to illustrate in these comments the enormous burdens placed on cable operators to implement this Act. Undoubtedly, implementing broadcast stations' must-carry/ retransmission consent elections will alter the existing cable channel line-up for most cable operators. Adding and dropping broadcast signals from the cable system will require some system reconfiguration and service visits to add or remove "traps" which block certain cable channels. Substantial time is also required to notify subscribers of the addition or deletion of signals.

Because of the time required to implement these changes and notify subscribers, TEL-COM urges the Commission to adopt an implementation schedule that accounts for these factors. Therefore, TEL-COM submits that rules adopted by the Commission to implement the must-carry and retransmission consent provisions of the Act become effective 30 days after the release of a final report and order in this proceeding. As discussed herein, the must-carry/retransmission consent election should be required to be made 30 days after the release of the Commission's final rules. The operator should then have 90 days to implement broadcast stations' elections. Unless both the must-carry and retransmission consent regulations become effective concurrently, cable operators would be forced to reconfigure their systems on a piecemeal basis as stations choose to assert their must-carry rights up until October 6, 1993. Such a result would be unnecessarily time consuming and incur duplicative costs.

Finally, the Commission must take into account the impact of this proceeding on copyright liability. For example, subsequent three-year election cycles for must-carry and retransmission consent, and changes in the top 100 market list should be effective either on January 1 or July 1 to coincide with the copyright reporting periods.

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COMMENTS OF TEL-COM., INC.

I. INTRODUCTION

TEL-COM., Inc. ("TEL-COM") by its attorneys, hereby submits these comments in response to the Federal Communication Commission's ("FCC"'s or "Commission"'s) Notice of Proposed Rulemaking ("NPRM") released on November 19, 1992, in the above-referenced proceeding.

By virtue of TEL-COM's ownership and operation of cable television systems throughout Kentucky, West Virginia, and Virginia, TEL-COM is subject to the mandatory carriage ("must-carry") and retransmission consent provisions of the Cable Television Consumer Protection and Competition Act of 1992 (the "Act"), as well as any implementing regulations promulgated by the FCC.

TEL-COM believes that the constitutionality of the must-carry and retransmission consent provisions of the Act cannot withstand judicial scrutiny. TEL-COM therefore supports those litigants who have challenged the constitutionality of these provisions in the United States District Court for the District of Columbia. Because these constitutional issues are currently being addressed in the judicial forum, TEL-COM limits the scope of its comments in this proceeding to those issues relating to the practical implementation of the must-carry and retransmission consent provisions of the Act.

II. MUST-CARRY REGULATIONS

A. Carriage of Local Noncommercial Educational Television Stations

Effective December 4, 1992,[1] "qualified" noncommercial educational ("NCE") television stations are entitled to must-carry privileges on cable systems in or near their service areas.[2] A qualified local NCE station is defined as a qualified NCE station[3] (1) which is licensed to a community that is within

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[1] The United States District Court for the District of Columbia, which is reviewing the constitutionality of the must-carry provisions of the Act with regard to both commercial and noncommercial broadcast stations, has issued a Standstill Order with regard to noncommercial mandatory carriage. See Turner Broadcasting Systems et al. v. F.C.C. et al., Consolidated Case Nos. 92-2247, 92-2292, 92-2494, 92-2495 and 92-2550 (D.D.C. December 8, 1992). Of course, the implementation of the Commission's rules for must-carry and/or retransmission consent will depend upon the final court action.

[2] A cable television system operator's ("cable operator"'s) must-carry obligations in this respect are dictated by the size of the cable system. Generally, systems with 12 or fewer usable activated channels must carry the signal of one qualified local NCE television station. Systems with 13 to 36 usable activated channels must carry the signal of all local NCE stations up to a total of three local NCE stations.

[3] An NCE station is considered qualified if (1) it is licensed by the Commission as an NCE station and if it is owned and operated by a public agency, nonprofit foundation, corporation, or association, and if that licensee is eligible to receive a community service grant from the Corporation for Public Broadcasting or (2) it is owned and operated by a municipality and transmits predominantly noncommercial programs for educational purposes. NPRM at ¶ 7.

50 miles of the cable system's "principal headend" or (2) whose Grade B service contour encompasses the principal headend of the cable system. 1992 Cable Act, Section 615(l)(2).

1. Principal Headend

TEL-COM agrees with the Commission's proposal, for purposes of the mandatory carriage rules, "to require a cable operator with multiple headend facilities to initially chose its principal headend, as long as the choice is not intended to circumvent must-carry obligations." NPRM at ¶ 8. As the Commission recognizes, many cable systems have multiple headend facilities. The cable operator should be permitted to determine which of the headends within its system is to be designated the "principal" headend as it is the cable operator who possesses the requisite technical knowledge regarding the configuration of the cable system necessary to make such a determination. It is likely that the operator will choose as the principal headend either the facility which serves the majority of the system's subscribers or the facility which accommodates the majority of the operator's signal processing functions. The Commission impliedly recognized the cable operator as the most appropriate entity to designate the principal headend in the must-carry rules adopted by the Commission in 1986. See Amendment of Part 76 of the Commission's Rules Concerning Carriage of Television Broadcast Signals by Cable Television Systems, 1 FCC Rcd 864, 887 (1986). The cable operator should notify the Commission in writing of its designation of the principal headend and the notice should be placed in the cable operator's public file.

Regarding a change in the designation of the principal headend, this eventuality is most likely to occur in the event of a redesign, acquisition, or disposition of a system.[4] Should a change the principal headend become necessary, the cable operator should be required to provide 30 days' prior notice to the must-carry NCE (and commercial) stations carried on the operator's system. Such 30-day notice period is consistent with the 30-day notice requirement for the deletion and repositioning of must-carry signals.

2. Signal Carriage Obligations

a. Selection of Signals

The Act requires, with certain exceptions for small and medium-sized systems, that cable operators carry all qualified local NCE stations requesting carriage. The Act specifically provides that (1) cable systems with 12 or fewer usable activated channels must carry the signal of one qualified NCE television station,[5] (2) cable systems with 13 to 36 usable activated channels must carry the signal of all local NCE television

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[4] As the Commission is aware, the rapid development of fiber optics does, in many cases, result in reconfiguration of a cable system and could require a change in the principal headend in a number of cases. TEL-COM itself has taken a number of separate cable systems and integrated them into a master cable system served from a new principal headend.

[5] If such a system operates beyond the presence of a qualified local NCE station, the system must import and carry a qualified NCE station.

stations up to a total of three local NCE stations,[6] and (3) cable systems with a capacity of more than 36 usable activated channels generally must carry the signals of all qualified local NCE stations requesting carriage. Medium-sized systems are not required to carry the signal of a local NCE station affiliated with a state public television network if that station's programming "substantially duplicates" the programming of a local NCE station (which is affiliated with the same network) being carried. Large systems are not required to carry the signals of additional local NCE stations if the programming of those additional systems substantially duplicates the programming broadcast by a qualified local NCE station requesting carriage.

Cable operators, particularly operators of small or medium-sized cable systems, may receive requests for carriage from more NCE stations than these systems are required to carry. TEL-COM agrees with the Commission's proposal that in such a situation the cable operator should have the discretion to select which qualified NCE station(s) it will carry. The Commission should require that, in such a case, the operator must inform the station requesting carriage that the operator is already carrying the maximum number of required NCE signals or that the programming of the station requesting carriage substantially duplicates the programming of an NCE station already being

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[6] If such a system operates beyond the presence of a local NCE television station, the cable operator is required to import and carry at least one qualified NCE television station. NPRM at ¶ 10.

carried. The Commission should not require that the cable operator justify its decision on any other grounds.

b. "Substantially Duplicative" Programming

The Commission has requested comment as to how it should determine if programming is "substantially duplicated" for purposes of the medium-sized system exception regarding state networks and the large-sized system exception. NPRM at ¶ 12. The Commission has proposed that a station will be deemed to "substantially duplicate" the programming of another station if more than 50 percent of its weekly prime time programming consists of programming aired on the other station. The Commission has requested comment as to this definition and has requested alternative definitions. Although TEL-COM recognizes that the Commission's proposal in this respect is consistent with its move away from simultaneous nonduplication protection[7], TEL-COM proposes that a station should be deemed to "substantially duplicate" the programming of another station if more than fourteen hours of the weekly prime time programming consists of programming aired on the other station. This definition of "substantially duplicates" was adopted by the Commission in 1986 in the revised must-carry rules in the context of network affiliates. See NPRM at fn. 33. TEL-COM proposes that this definition be applied equally to both medium and large-sized

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[7] Amendment of Parts 73 and 76 of the Commission's Rules Relating to Program Exclusivity in the Cable and Broadcast Industries, 3 FCC Rcd. 5299, 5317, (1988) recon., 4 FCC Rcd. 2711 (1989).

cable systems for the purposes of evaluating NCE must-carry requests. In addition, this definition should apply for the purposes of evaluating commercial must-carry requests. Adoption of this definition will ensure a balance between the purposes of the Act to (1) ensure carriage of local NCE stations, (2) not unduly burden cable operators with an obligation to carry repetitious programming, and (3) afford the public access to a wide selection of programming.

c. State Public Network Affiliated Stations

As noted in section II.A.2.a above, medium-sized cable systems are not required to carry the signal of a local NCE station affiliated with a state public television network if that station's programming "substantially duplicates" the programming of another local NCE station being carried which is affiliated with the same state public television network. TEL-COM notes that a cable system which is located near a state border or in a tri-state area may be required to carry substantially duplicative signals from state network affiliated NCE's from two or three different states as no exception exists for this circumstance.[8] This would create a penalty to the cable operator based upon the geographic location of its system. TEL-COM proposes that in a situation where an operator is located in only one state and more than one NCE signal from different state authorities qualify for must-carry status, the operator should be able to choose to carry

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[8] TEL-COM's own integrated system operates in three states - Kentucky, West Virginia, and Virginia.

the NCE station from the state where the cable operator's subscribers reside.

d. Unused Public, Educational, and Governmental ("PEG") Channels

The Act provides that cable operators may place additional NCE stations on unused PEG channels. In this regard, the term "unused" has not been defined for the purposes of determining whether additional NCE stations may be carried. TEL-COM notes that in many instances channels reserved for PEG use do not offer "real" programming, but instead carry automated, electronic "billboard" notices instead. In a case where more than one PEG channel on a system carry duplicative information, the cable operator should be permitted to place additional NCE stations on those PEG channels which would otherwise exhibit wholly duplicative "billboard" notices. Any additional NCE station placed on an unused PEG channel would be carried on the channel on a "may-carry" basis. Accordingly, such an NCE station would not be entitled to any must-carry rights such as channel positioning, etc. In the event that a PEG user subsequently requests access, the NCE station could be removed from the channel on 30-days' prior notice.

e. Notice Requirements

The Commission has requested comment with regard to the procedures to be adopted for notification by a cable operator to NCE stations and the public which would identify channels carried by the cable operator pursuant to the must-carry requirements. TEL-COM proposes that a list of the must-carry NCE and commercial stations carried by the cable operator be placed in the cable operator's public file.

B. Carriage of Local Commercial Television Stations

The Act provides that each cable operator must carry a specified number of local commercial television stations and qualified low power television ("LPTV") stations. The operator of a cable system with 12 or fewer usable activated channels must carry the signals of at least three local commercial television stations unless the system serves 300 or fewer subscribers.[9] The operator of a cable system with more than 12 usable activated channels is required to devote up to one-third of the channel capacity of the system to carriage of the signals of local commercial television stations.

1. Provision of Converters

The Act provides that every subscriber of a cable television system must receive all signals carried pursuant to the system's must-carry obligations and that all such signals be viewable via cable on all television receivers of a subscriber which are connected to a cable system by a cable operator or for which a cable operator provides a cable connection. If a cable operator authorizes subscribers to install additional receiver connections, but does not provide the subscriber with such connections or with the equipment and materials for such

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[9] Cable systems that serve 300 or fewer subscribers are not subject to any must-carry requirements as long as they do not delete from carriage any signal of a broadcast television station. Section 614(b)(1)(A) of the Act.

connections, the operator is required to notify such subscribers of all broadcast stations carried on the cable system which cannot be viewed via cable without a converter box. In such a case, the cable operator is required to offer to sell or lease a converter box to such subscribers. The Commission seeks comment with regard to the notification requirements concerning those broadcast stations which cannot be viewed without a converter. TEL-COM proposes that such required notice be included with the subscriber's monthly bill. In addition, TEL-COM proposes that cable operators not be required to maintain converters in stock for sale or lease to subscribers if such equipment is available from other retailers. If a cable operator chooses not to stock such converters for sale or lease, the requirement that an operator offer to sell or lease any required converter should be satisfied by an operator's notification to a subscriber as to where such a converter may be purchased or leased[10]. Finally, any such requirement should not become effective until the Commission adopts standards with regard to rates for such equipment in the Commission's rate-making proceeding.

2. Location of the Cable System

The Commission has requested comment with regard to the basis for determining the location of a cable system for application of the must-carry provisions for commercial

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[10] TEL-COM proposes that the notice requirement may be satisfied by the cable operator if the cable operator identifies the type of retail stores which offer converters for purchase or lease (e.g. consumer electronic stores). The cable operator should not be required to identify retail stores by name.

television stations. In this regard, TEL-COM proposes that the location of the cable system should be based on the location of the principal headend. Permitting the cable operator to designate which of its facilities is the principal headend is consistent with past Commission policy. See Amendment of Part 76 of the Commission's Rules Concerning Carriage of Television Broadcast Signals by Cable Television Systems, 1 FCC Rcd. 864, 877 (1986). As discussed above in section II.A.1, the cable operator will likely designate as the principal headend the facility where the signal processing equipment is located or where the majority of subscribers in the system are located. The cable operator is in the best position to make this determination. Because there is little discretion involved in designating the principal headend, it is highly unlikely that a particular designation would be made by a cable operator for the purpose of circumventing its must-carry obligations. As also noted above in section II.A.1, this designation is unlikely to change.

Defining the location of a cable system based on the location of the principal headend is particularly critical in the context of commercial television. If the location of a cable system were defined based on the geographic area served by the system, a technically integrated cable system located in more than one market could be subject to potentially inconsistent carriage obligations. The Commission itself has noted this concern. See NPRM at ¶ 17. It would be very difficult if not virtually impossible for a cable operator to accommodate carriage requests from broadcast stations in two or three Areas of Dominant Influence ("ADI"s). Limiting a cable operator's must-carry obligations with regard to commercial television broadcast stations to those stations located in only one ADI will result in a more consistent application of the requirements of the Act. The carriage of other signals should be determined by the retransmission consent "marketplace".

Defining the location of a cable system based on the location of the principal headend would provide uniform application of the Act throughout the system for carriage purposes. Clearly, it was not the intent of Congress to place demands on the cable system for the carriage of signals in excess of the capacity required by the Act nor to subject cable operators to must-carry obligations from stations in more than one market. In fact, the term "local television station" is defined in the Act as a station operating in a community of license which "is within the same television market as the cable system". By its use of the term "market" in the singular, Congress has implied that each cable system would fall within one market. Such is the case for most cable systems. However, there are also a significant number of cable systems that fall within more than one ADI. TEL-COM's own system is located in the Charleston - Huntington, W.V. (50) and Bristol, VA - Kingsport - Johnson City, TN (87) ADIs. These systems should not be penalized by virtue of their geographical location. If a cable operator is required to accommodate requests for carriage from more than one ADI, implementing broadcasters' rights to mandatory carriage would no doubt be slowed in the event that disputes among stations for scarce channel capacity must first be resolved by the Commission. The Act provides that both commercial and NCE must-carry stations have certain channel positioning rights, as discussed below. Accommodating channel positioning requests from stations in one ADI, consistent with the operator's broadcaster tier, presents enormous difficulties. Attempting to accommodate multiple, conflicting channel positioning requests in more than one ADI may be virtually impossible.

In addition, Congress sought to address in the Act the debatable issue of loss of revenue by broadcast stations which were unable to compete effectively with cable systems for limited advertising revenues. If stations in multiple ADIs are forced to compete with each other for cable channel capacity, these stations are also competing for the same advertising money. Alternatively, television stations that must only compete with other stations within the same ADI for carriage on the cable system have a stronger competitive position.

Finally, as discussed below, the Act provides for procedures to modify an ADI to further the purposes of the Act. The fact that Congress provided procedures to address possible inequities resulting from the composition of a particular ADI demonstrates that Congress recognized that the general rule of one market per cable system may be modified upon a proper showing. Thus, for example, a station that has historically been carried on a system, but which falls outside the ADI in which the cable system is located and would have to be dropped from the system, may petition the Commission for relief.[11]

Accordingly, TEL-COM proposes that for purposes of applying the must-carry rules, the location of the cable system must be defined on the basis of the location of the principal headend.

3. Modification of ADIs

The Act provides that the Commission may add communities to or subtract communities from a station's television market pursuant to a written request. In the NPRM, the Commission notes that the Act does not specify whether such requests are to be made by the broadcast station or the cable operator. TEL-COM proposes that either party should be permitted to file such a request, and that in accordance with the Commission's proposal parties should be required to file any such requests pursuant to the procedures for special relief set forth in section 76.7 of the Commission's rules.

The Act specifies that the Commission should, when considering requests to add communities to or subtract communities from a station's television market, take into account the four factors set forth in the Act. TEL-COM submits that any tests performed to determine a station's viewability must be

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[11] Of course, the station could grant retransmission consent to carriage by the cable operator. TEL-COM would evaluate such a request based on its subscribers' preferences.

based on an over-the-air standard. This standard should preclude the use of translators, which is consistent with past policies of the Commission. With the exception of certain NCE translators, translators are not entitled to must-carry rights and should not form the basis for carriage of a station. In addition, a broadcast station's over-the-air signal should reach the cable operator's principal headend at the required signal strength levels defined in the Act. Otherwise, Congress' intent to foster localism would be frustrated by stations located hundreds of miles from the cable system's principal headend qualifying for must-carry status.

Finally, the Act provides that broadcast stations must elect whether to proceed under the must-carry rules or the retransmission consent provisions once every three years. However, Arbitron modifies its ADI list once every year. A change in this list could move a county from one ADI to another and, as a result, a broadcast station's position as to whether it is eligible for must-carry rights could change. TEL-COM proposes that any ADI changes reflected in Arbitron's annual list would not be effective until the three year must-carry/retransmission consent election period expires. Thus, the status quo would be maintained during the three year cycle even though Arbitron's list reflects a change in an ADI during that period. In addition, as discussed below, the must-carry/retransmission election should be effective well in advance of the copyright period beginning on January 1, 1994 in order to provide cable operators sufficient time to implement changes in the event broadcast stations must be added or dropped from the cable system. Subsequent election cycles should take into account the January 1 and July 1 compulsory copyright license deadlines.

4. Modification of Top 100 Market List

The Act requires the Commission to update the top 100 market list set forth at section 76.51 of the Commission's rules. Modification of this list will effect the cable operator's copyright liability for the carriage of television signals. For example, a signal might lose its status as a "local" signal under the compulsory copyright license. Other distant "permissible" signals could become "impermissible" signals. TEL-COM proposes that the Commission update this top 100 market list once every three years. This three year period is consistent with the three year must-carry/retransmission consent election period. In addition, the effective date of any change to the top 100 market list should be consistent with the January 1 or July 1 semi-annual copyright statement of accounts periods. This is necessary because the cable operator is not required to carry the signal of a must-carry broadcast station if the station does not agree to indemnify the cable operator for copyright liability resulting from the system's carriage of a distant signal. Thus, both the cable operator and the broadcast station would be unable to ascertain the amount of copyright liability unless the implementation date for any change in the top 100 market list is consistent with both the must-carry/retransmission consent election period and the copyright reporting period.

5. Syndicated Exclusivity and Network Nonduplication

The Act's provisions permitting local television stations to choose between must-carry status and negotiated carriage based on retransmission consent conflict with existing Commission rules relating to the manner of carriage of television stations. The Act provides that, with the exception of "superstations", all nonlocal stations can be carried only if they grant retransmission consent to the cable operator. Existing network nonduplication and/or syndicated exclusivity rules would allow a station which is located outside the applicable ADI (and thus ineligible for must-carry status), but which encompasses the cable system or a portion thereof within its 35-mile primary or 55-mile secondary zone,[12] to black out a station asserting must-carry rights. Similarly, a station that has not granted retransmission consent for its programming could assert similar protection rights, even though the assertion of such rights would deprive the public of access to a particular program.[13]

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[12] The secondary zone applies only to smaller market television stations with respect to their network nonduplication rights.

[13] By abolishing the A/B switch requirement, Congress has acknowledged that carriage of a signal over the air via a subscriber antenna using the A/B switch is not a very good means to receive such programming.